***United States Court of Appeals***

***for the Second Circuit***


# APPELLANT'S REPLY BRIEF

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

75-1192

No. 75-1192

UNITED STATES OF AMERICA,

Appellee,

v.

RICHARD HUSS and JEFFREY SMILOW,

Appellants

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

# APPELLANTS' REPLY BRIEF

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# APPELLANTS' REPLY BRIEF

The central substantive issue in this case -- i.e., whether there is a constitutional duty on the United States Bureau of Prisons to provide kosher prepackaged dinners for kashruth-observing Jewish prisoners -- is amply covered in the extensive initial briefs filed on both sides. We submit this Reply Brief under the great time restraints imposed by expedited briefing and argument principally to direct the Court's attention to two statutory provisions not previously discussed and to clarify an argument in our original brief that was apparently misunderstood by the government.

(1) The statutory basis for the relief sought. - This case has heretofore been argued as if the only question presented were an issue of constitutional law under the First Amendment. The government has discussed and relied on recent Supreme Court cases involving State prison officials, as have we, and the argument has focussed on what the Constitution requires. Without belaboring or repeating our principal arguments, we note only, in this regard, that the government's entire argument treats the diminution of available and necessary food to a federal prisoner as if it were nothing more than a withdrawal of some desirable convenience or additional religious flourish, rather than the deprivation of a human necessity. The Eighth Amendment is mentioned only in the conclusory sentences on pages 17 and 20 of the government's brief. There is, of course, a fundamental distinction which cannot be papered over between a Bureau of Prisons' policy that results in elimination of a religious observance which has no physical consequences and a policy that has a direct effect on

a prisoner's health. If, for example, the Bureau of Prisons decided that no prisons would henceforth provide or make available any religious worship facilities, the effect would be harmful to the rights of free exercise of religion, but no prisoner would suffer physical consequences. It could not readily be asserted that such a policy violated the Eighth Amendment's prohibition against cruel and unusual punishments. On the other hand, a policy that effectively deprives a prisoner of needed subsistence by forcing him to choose between his spirit and his body can, we submit, fairly be characterized as barbarous.

This brings us to the federal statutory duty imposed on the Attorney General and the Bureau of Prisons. They are obliged, under 18 U.S.C. § 4042(2), to "provide suitable quarters and provide for the safekeeping, care and subsistence of all persons charged with or convicted of offenses against the United States. . . . " (emphasis added). The statutory obligation to provide "care" has been construed, in at least one case, as compelling the Bureau of Prisons to provide "the most suitable medical teatment reasonably available," including the transfer of a prisoner from a prison "in a climate of relatively high humidity" to a prison "in a climate of relatively low humidity." Ricketts v. Ciccone, 371 F. Supp. 2149 (W.D. Mo. 1974). A parallel construction of the statutory duty to provide "subsistence" -- when read against the constitutional background of the decisions which would raise grave constitutional issues if adequate subsistence were denied because of a prisoner's religious convictions -- requires the Bureau of Prisons to give "reasonably available" food that meets religious standards.

The well established principle governing contruction of federal laws is that "a statute should be interpreted, if fairly possible, in such a way as to free it from not insubstantial constitutional doubts." Lynch v. Overholser, 369 U.S. 705, 711 (1962). The ruling by Judge Weinstein in the Kahane case at least raises "not insubstantial doubts" as to the validity of a Bureau of Prisons policy that would not provide proper subsistence to a religiously observant inmate. Accordingly, this Court may, if it so chooses, resolve this case in appellants' favor by construing the federal statute, without reaching the broad constitutional issue and affecting the validity of State practices.

A second relevant section of federal law is 18 U.S.C. § 4011, which provides as follows:

> Collections in cash for meals, laundry, barber service uniform equipment, and other times for which payment is made originally from appropriations for the maintenance and operation of Federal penal and correctional institutions, may be deposited in the Treasury to the credit of the appropriation currently available for those items when the collection is made.

The government has argued below and in this Court that the Bureau of Prisons has no authority to collect funds from inmates for special meals and that to do so would violate an important disciplinary rule in prison. Yet it appears from Section 4011 that the Congress views cash payments for meals as being a permissible means of obtaining compensation for unique personal services in federal penal institutions. Indeed, the statute specifically provides for the deposit and credit of such cash collection.

Nor can it be argued that Section 4011 deals only with collections from prison employees, and not from inmates. There is, first of all, no express limitation to this effect in the law. Second, the legislative history provides no

support for such a limiting rule. The provision was first enacted into law in 1950 in a bill providing for the administrative expenses of the Department of Justice. An Acting Assistant to the Attorney General explained its purpose as follows (S. Rep. No. 1258, 81st Cong., 2d Sess (1950), pp. 2-3; H.R.Rep. No. 2309, 81st Cong., 2d Sess. (1950), p. 3):

> Section 9 would permit the deposit of collections by penal institutions for meals, laundry, barber service, uniform equipment, and other items, in the Treasury to the credit of the appropriation currently available for such items instead of to the credit of miscellaneous receipts. It is purely a matter of accounting procedure to make such funds available for further expenditure.

The argument set out at pp. 49-54 of the government's brief -- if it warrants consideration at all -- is fully answered by the statutory mechanism provided in Section 4011. We contend initially, of course, that the cost of properly feeding an inmate whose religious convictions demand a particular diet is properly to be borne by the government agency which incarcerates him -- just as it must bear the cost of his medical care or other personal characteristics that might occasion additional expense. (If a prisoner's size requires that a special prison uniform be prepared, for example, the prison authorities could hardly make him walk naked or fit into an undersized garment because there would be added expense in preparing a new suit.)

(2) Appellant Huss' claim. -- Our argument with regard to appellant Huss has apparently been misunderstood by the government. We do not contend that his religion "changed" between his initial testimony and his reappearance on the witness stand. What he believed on April 1 was,

we submit, the same as he believed on April 30. But the testimony of April 30 made it clear that his preference for kosher food was a matter of religious conviction; if kosher food is available, he said, he would eat that food as a matter of conscience.

In our view, that places Huss' observance of Kashruth on a par with the observance by other prisoners of other religious rites. The Methodist prisoner who consults with a minister is doing so not because he will be struck by lightning or will be excommunicated because he fails to do so. His action is motivated by religious conscience, and would be so motivated even if he admitted that he had not visited a minister for two years before entering prison.

In short, the Free Exercise Clause of the First Amendment protects not merely what is absolutely and unequivocally demanded as a matter of religious conviction, but also the religious belief or conduct that a believer deems desirable. A religious believer cannot be deprived of religious literature in his cell even if possession of religious literature is not divinely decreed by unexceptional command. Free exercise of religion includes the opportunity to exercise those choices which religious conscience may direct.

Huss' testimony distinguishes his case from Smilow's in only one respect -- it eliminates the Eighth Amendment element from his case. Since Huss is ready and willing to eat nonkosher food if it is available, the consequences of the Bureau of Prions' policy are not as physically debilitating to him as they are to Smilow. But the fact that he eats kosher food when it is available for religious reasons places him in the same position as a Catholic inmate who says that he would like to attend church on Sundays but has not gone regularly in the past and can live without going in the future. When the prison

affords him a worship service it is permitting him free of exercise of a religious belief -- even if it is a belief that he does not universally practice.

We cited the Bureau of Prisons' regulation relating to "change" of religion in our original brief not to argue that Huss had undergone such a "change" but to draw this Court's attention to the proper Bureau of Prisons' policy recognizing noninterference in prisoners' religious beliefs. That same policy, we submit, warrants accepting at full value Mr. Huss' explanation of his beliefs regarding kosher food. And if that belief is accepted, his request for kosher food is as much a matter of conscience as Mr. Smilow's.

To be sure, the government's interest might be weighed differently when all that is on the opposite side of the scale is a religious preference than when the scale is balanced by a religious command that results in physical debilitation. In other words, harm to some legitimate government interest that would not suffice to require a prisoner (such as Smilow) to starve himself or violate religious convictions might still be enough to outweigh a religious interest such as Huss'. But we believe that the close examination of government interests required here will establish that the government has only the most flimsy of reasons for denying prepackaged foods that the appellants seek. The reason is inconvenience alone -- and the specter of disruption that has been refuted by every known experiment, but one, conducted in this area under federal or local auspices. Such chimerical doubts should not be permitted to affect the real situation of these prisoners.

(3) The jurisdiction of the district court. -- The statutory arguments we have previously made also bolster the jurisdictional basis for this case in this Court. If the warden who had custody of the appellants had the federal statutory duty to provide them with kosher packaged meals, that duty could be enforced under the federal mandamus statute, 28 U.S.C. § 1361. When the motion was brought before Judge Griesa, the appellants were in New York, free on bail. They were, therefore, technically in the custody of the United States Marshal and the Attorney General in this district. Throughout the hearing below, they were also in the Southern District of New York. It would be the sheerest of formalities -- not consistent with the obligation of federal courts "to secure the just, speedy, and inexpensive determination of every action" (Rule 1 of the Federal Rules of Civil Procedure) -- to dismiss this action now -- after the government asserted no jurisdictional objection to the form in which relief was sought below -- simply because no independent civil action was instituted in the Southern District of New York. Whether the Court relies upon Rule 35 of the Federal Rules of Criminal Procedure, or 28 U.S.C. § 2255 or 28 U.S.C. § 1361, or possibly even on the All Writs Act, 28 U.S.C. § 1651, we believe there is ample basis for an affirmative finding on jurisdiction. The parties are before the Court; they are presenting the issues in an aggressive adversarial form; the court had personal custody throughout the proceedings below over the individual appellants; and the issue is one that all parties agree should be decided promptly. There is no purpose whatever to be served in forcing the parties to reinstitute the action with the filing of a new complaint.

In Genovese v. Ciccone, 331 F. Supp. 1117, 1118 (W.D. Mo. 1971), (emphasis added), a district court observed that "under the provisions of Section 4082, Title 18, United States Code, the place of a federal prisoner's confinement is vested in the discretion of the Attorney General or his authorized delegate. In the absence of exceptional circumstances or the denial of a federal constitutional or statutory right, the exercise of that discretion will not be reviewed in the Courts." This is precisely such an "exceptional" case, and this Court unquestionably had jurisdiction over the parties and the issue throughout the hearing below. Neither the formal question whether a separate complaint was filed nor the removal of the appellants from this jurisdiction since the termination of the hearing should affect that clear jurisdiction.

For the foregoing reasons and those previously stated, the order of the district court should be reversed and the United States directed to provide kosher prepackaged food to the appellants.

Respectfully submitted,

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